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IN THE

Supreme Court of the United States

No. 703

October Term, 1958

ERWIN MANGET ENZOR,

Petitioner

vs

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

No._____

October Term, 1958

ERWIN MANGET ENZOR,

Petitioner

vs

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

Now comes ERWIN MANGET ENZOR, petitioner in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

REFERENCE TO OFFICIAL REPORT

The opinion delivered in the court below in this case has not been reported at the present time, but is set forth in the appendix to this petition.

GROUNDS OF JURISDICTION

1. The judgment of the Court of Appeals was entered on December 16, 1958.

2. A petition for rehearing was denied on January 14, 1959.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the contents of a conversation heard by a witness over a radio receiver listening device between a government employee and another person whose identity was unknown concerning matters tending to incriminate a defendant on trial are admissible in a criminal case when offered by the government and objected to by the accused as being hearsay.

2. Whether a United States Court of Appeals has the jurisdiction and authority to reverse a criminal case and remand it back to the district court with instructions to vacate a sentence of four years imposed on a defendant and increase the sentence to not less than five years, when the appeal was filed by the defendant on questions only involving the admissibility of evidence, and the Court of Appeals held the assignments of error by the defendant to be without merit, and the United States failed to file an appeal or cross-appeal to the sentence or make any motion to the district court to correct the sentence.

3. Whether a person is subject for the same offense to be twice put in jeopardy of life or limb where a Court of Appeals, without any attack by the defendant on the sentence previously imposed, orders the district court to impose an increased punishment on the convicted person.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 5 — United States Constitution:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

18 U.S.C.A. #371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and any one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

26 U.S.C.A. 7237 (b) as amended 1956, 70 Stat. 568:

> "Whoever commits an offense, or conspires to commit an offense, described in section 4705 (a) or section 4742 (a) shall be imprisoned not less than 5 or more than 20 years."

26 U.S.C.A. #4705 (a):

> "It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

STATEMENT OF THE CASE

Petitioner was jointly indicted in the U. S. District Court for the Northern District of Georgia with Albert Asa Tucker, for conspiracy to violate the Narcotic Drug Act—selling drugs to William Avery Carroll not in pursuance of a written order form, and selling said drugs to Carroll not in or from the original stamped packages.

Carroll, as a witness for the Government, testified that along about the latter part of February, 1957, he had a conversation with Tucker relative to the purchase of narcotics. (R. 44.) Another Government witness, E. R. Barber, testified that on the night of April 11 he observed Agent Thomas place a Schmidt device on the person of Avery Carroll, and saw Avery Carroll enter 313 Washington Street, where Tucker lived. (R. 65.) The witness, E. R. Barber, then attempted to testify to what he had heard over the receiver of the Schmidt device, and counsel for defendant objected. The court sustained the objection, then made the following ruling:

The Court:

> "So you won't misunderstand; I don't sustain any objection to what he heard over the Schmidt device, I sustain the objection to what Carroll said or who he said he was talking to over the device, any identification that he might have made." (R. 66.)

The witness, E. R. Barber, then further testified, over the objection of counsel for defendant, that "a person said his connection still had some tincture of opium." The Court then ruled on the objection as follows:

> "Well, Albert Tucker has testified and Carroll has testified in the case, and I am going to admit it. Go ahead."

The court then permitted the witness to testify as to the contents of the conversation between one whom he identified as Carroll's voice, (R. 69), and an unidentified third person. The witness testified that Carroll was heard to ask the other person if he could get him any more narcotics, and the other person was said at that time that he could not get hold of any, and could not contact his connection that night but he could the following morning. (R. 69 and 70.)

The Government later recalled Avery Carroll as a witness for the purpose of tieing in the conversation, but he testified that he had, after March, had the Schmidt device on his person, and that he had a conversation with a drunk person at one time while he was wearing it and that he had conversations with the narcotics agents besides Mr. Tucker. (R. 102.)

Petitioner was found guilty by the jury on the conspiracy count and sentenced by the trial court to serve four (4) years in the custody of the Attorney General. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, assigning error on the admission of the testimony of E. R. Barber as being hearsay, no proper foundation for admissibility being shown by the Government.

No appeal or cross-appeal was filed by the Government to the legality of the sentence imposed by the trial judge, and no question as to the validity of the sentence was urged by petitioner in the Court of Appeals. Notwithstanding, the Court of Appeals held the assignment of error to be without merit, and, upon a suggestion by the United States Attorney, made for the first time in the brief of the United States, the Court

of Appeals reversed the cause and remanded it to the trial court to enter a sentence of not less than five (5) years, being at least one year more than that imposed by the trial judge.

ARGUMENT

1.

Both Carroll and Tucker testified as witnesses for the government. Neither testified to the facts concerning the conversation that Agent Barber was permitted to testify about. Carroll, according to the testimony, was a special employee of the government. His acts and declarations outside the presence of the petitioner or Tucker, the alleged co-conspirator, would be hearsay and therefore inadmissible.

Barber's testimony proved only one thing; that he overheard the voice of Carroll. This, in itself, was hearsay. His further testimony, however, attempted to have the jury believe that Carroll was talking to Tucker at the time. If this was true, then the conversation was admissible, inasmuch as Tucker was charged as a conspirator. On the other hand, however, if this was not true, the conversation between Carroll and some other person would be hearsay and inadmissible.

The Court of Appeals reached the conclusion that the conversation was admissible because of Carroll's testimony that while he was wearing the device he did not talk with anyone except Tucker, the narcotics agents and a drunk person whom he didn't know. There was no testimony that Carroll was referring to the two narcotic agents in the case. He might very easily have been referring to others. The Court of Appeals then elimi-

nated the drunken person because they concluded that the conversation as overheard was between Carroll and someone "known by him and by whom he was known." There is no evidence to this fact, and the elimination of this drunken person was not sufficiently established.

2.

The Court of Appeals deemed the assignment of error by the appellant to be without merit, and refused to grant a new trial. If the Court of Appeals had awarded a new trial, it could have instructed the district court to impose a different punishment if a further conviction followed. However, no attack was made by the appellant on the validity of the sentence imposed. He was attacking the verdict. No appeal was filed by the government to the propriety of the sentence; nor does the federal law authorize an appeal on behalf of the government to such questions. No cross-appeal was filed by the government. No motion was made by the government to the district court to correct the sentence.

A United States Court of Appeals *is just that.* It has no original jurisdiction insofar as sentencing is concerned. Its jurisdiction is limited by law to the *correction of errors.* Without a motion having been made to the district court to correct the sentence, there was no error to correct.

Furthermore, if the trial judge in this case committed any error in sentencing petitioner on the general conspiracy statute, carrying a maximum sentence of five years, the error was brought about in the first instance by the government in bringing the indictment. The indictment specifically charged the defendants with violating 18 U.S.C., #371, (the general conspiracy section),

and this is the section followed by the trial judge in his sentence.

3.

The judgment of the Court of Appeals in ordering the district court to impose an increased sentence, has the effect of subjecting petitioner "for the same offense to be twice put in jeopardy of life or limb."

It must be distinguished from that line of cases holding that where a defendant invokes the ruling of a habeas corpus court to successfully declare a sentence void, he cannot thereafter complain of a resentence to a valid punishment imposed upon him by the trial court. In such case the defendant waives the protection of the fifth amendment, and is estopped from complaining of a resentence.

It must also be distinguished from that line of cases holding that where a defendant moves for a new trial, he cannot complain of being retried or resentenced, because his motion for new trial is a waiver of the privilege afforded him by the fifth amendment not to be twice placed in jeopardy for the same offense.

This case must stand in line with those cases holding the government not to be entitled to appeal from an acquittal or from an erroneous sentence below the minimum provided for by law.

If an error was committed by the court in the imposition of the sentence (and we do not concede that the court did) it was an error over which the government has no appeal, and to hold that the district court can vacate the sentence imposed and order an increased punishment will place all defendants who intend to ap-

peal their convictions "in jeopardy" of increased punishment.

The Court of Appeals, in ordering the district court to resentence petitioner to a greater punishment, overlooked the case of

United States v. Benz,

282 U. S. 304, (51 S. Ct. 113,) wherein this Court held contrary thereto as follows:

> "The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'"

The Benz case, supra, is based upon the older case of

In re Lange, 18 Wall. 163, (21 L. Ed. 872),

wherein this Court held that a trial court had jurisdiction over its judgments, orders and decrees, in both civil and criminal cases, during the term at which they were rendered, but that such power could not be so used as to violate the constitutional guarantee against double punishment; holding that this guaranty applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence.

Respectfully submitted,

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APPENDIX "A"

JUDGMENT

Extract from the Minutes of December 16, 1958.

No. 17165

ERWIN MANGET ENZOR,

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter a proper sentence in accordance with the opinion of this Court.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17165

ERWIN MANGET ENZOR

Appellant,

versus

UNITED STATES OF AMERICA

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(December 16, 1958.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant, Erwin M. Enzor, and Albert A. Tucker were charged by indictment with conspiring unlawfully to sell narcotics. The indictment, by two other counts, charged the appellant and Tucker with making unlawful sales of narcotics. Tucker entered a plea of guilty to one of the substan-

tive counts. Appellant was convicted of the conspiracy charge and was sentenced to four years imprisonment. He has appealed from the conviction. The sales were made to Avery Carroll, a sometime narcotic addict and an undercover employee of the Federal Bureau of Narcotics. Tucker acted as an intermediary between Carroll and the person furnishing the narcotics. This person was identified by Tucker as the appellant. Both Carroll and Tucker were witnesses for the Government as were Narcotics Agents Barber and Thomas and Detective Melton, of the Atlanta, Georgia, Police Department. During the investigation Agents Thomas and Barber tested and found properly operating a Schmidt device, or miniature radio transmitter, which they placed on Carroll. Carroll then entered the premises where Tucker lived. The agents listened in, over the Schmidt device received, to a conversation betwe n Carroll and some other person. Carroll was told by the other person, supposed to be Tucker, that his connection had narcotics, the kinds of which were named, and for Carroll to contact him the following day. The agents were able to recognize and identify Carroll's voice as it came through the receiver. They did not identify the voice of the person in the building with whom Carroll was talking. The appellant asserts that it was prejudicial error to admit evidence of the conversation without identification of the person who made the statements to Carroll.

The appellant suggests that the same rule should be applicable here as in the case of telephone conversations and says that the rule is thus declared:

> "An admission made in a telephone conversation may be proved, where the witness identified the speaker by his voice or otherwise, and there is no

> doubt as to the identity of the person who made the admission." 31 C.J.S. 1031, Evidence § 281.

Also relied upon by the appellant is the principle that:

> "Unless otherwise objectionable, a telephone conversation between a witness and another person is admissible in any case in which a face to face conversation between a witness and another person would be admissible in evidence, provided that the identity of the person with whom the witness was speaking is satisfactorily established, but not otherwise." 31 C.J.S. 908, Evidence § 188.

It is not contended that the testimony of the narcotics agents would be inadmissible if the person with whom Carroll talked was identified as Tucker. Carroll testified that while he was wearing the device he did not talk with anyone except Tucker, the narcotics agents and a drunk person whom he didn't know. Both of the narcotics agents were listening in on the receiver of the device during the questioned conversation. The conversation as overheard was between Carroll and someone known by him and by whom he was known. The drunken stranger was therefore not the person with whom Carroll conversed. Hence Tucker, by elimination of the others, is shown to be the person. The identity of Tucker as the person with whom Carroll was speaking is satisfactorily established and there is no doubt as to his identity.

The appellant's conviction was upon a count of the indictment which charged that he conspired with Tucker

> " • • • to commit certain offenses against the laws of the United States pertaining to the sale, barter, exchange and giving away of narcotic drugs, by violating the following section of the United States Code, to wit:

"(a) To unlawfully, wilfully and knowingly sell, barter, exchange and give away narcotic drugs not in pursuance of a written order of the person to whom such drugs are sold, bartered, exchanged or given, in violation of Section 4705(a), Title 26 U.S.C.

"And your Grand Jurors further charge that • • • said defendant and co-conspirators • • • did commit numerous overt acts within the jurisdiction of this Court, among which are the following:

• • • •

"And the Grand Jurors further charge that all of the overt acts herein alleged to have been committed were committed in furtherance of said wilful, unlawful, fraudulent and felonious conspiracy, combination, agreement, confederation and understanding, and to effect the objects and purposes of the same, in violation of Section 371, Title 18, U.S.C.A."

The substantive offense, which was the object of the conspiracy, is thus defined:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate." 26 U.S.C.A. § 4705(a).

The specific statute relating to penalties for narcotics violations provides:

"Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years • • •." 26 U.S.C.A. § 7237 (b) as amended 1956, 70 Stat. 568.

The general statute on criminal conspiracy is in this language:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C.A. § 371.

The Government urges that the conviction was of an offense under the specific statute notwithstanding a reference to the general statute in the indictment. As between two statutes punishing conspiracy, the particular statute is entitled to preference over the general statute. *Mazi v. United States*, 5th Cir. 1955, 223 F. 2d 532; *Price v. United States*, 5th Cir. 1934, 74 F. 2d 120, cert. den. 294 U. S. 720, 55 S. Ct. 549, 79 L. Ed. 1252, reh. den. 295 U. S. 767, 55 S. Ct. 643, 79 L. Ed. 1708; *Robinson v. U. S.*, 8th Cir. 1944, 142 F. 2d 431. The statute on which an indictment is founded is to be determined from the facts charged in the indictment, and the facts pleaded may bring the offense within one statute, although another statute is referred to in the indictment. *Mazi v. United States, supra; United States v. McKnight*, 2nd Cir. 1958, 253 F. 2d 817. The indictment charged an offense under 26 U.S.C.A. § 7237 (b), as amended, for which the minimum prison term is five years, one year more than fixed by the court's sentence.

Where, as here, an appeal has been taken from a conviction and sentence in a criminal case and the conviction is found to be free from error, the case may nevertheless be remanded for a proper sentence upon the

suggestion of the United States Attorney. *Bozza v. United States*, 330 U. S. 160, 67 S. Ct. 645, 91 L. Ed. 818; *Barrow v. United States*, 54 App. D. C. 128, 295 F. 949; *Cook v. United States*, 1st Cir. 1948, 171 F. 2d 567, cert. den. 336 U. S. 926; 69 S. Ct. 647, 93 L. Ed. 1088; *McQuaid v. United States*, D. C. Cir. 1951, 84 App. D. C. 275, 193 F. 2d 696. See also Rule 35, Fed. Rules Crim. Proc.; *Beland v. United States*, 5th Cir. 1942, 128 F. 2d 795, cert. den. 317 U. S. 676, 63 S. Ct. 157, 87 L. Ed. 543; *Hayes v. United States*, D. C. Cir. 1957, 249 F. 2d 516, cert. den. 356 U. S. 91, 78 S. Ct. 672, 2 L. Ed. 2d 586.

It follows that the judgment will be reversed and the cause remanded with directions to the district court to enter a proper sentence in accordance with this opinion.

REVERSED AND REMANDED.

A true copy
Test:
/s/ EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

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No. 705

In the Supreme Court of the United States

October Term, 1958

EARLE MASSEY EATON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
MALCOLM RICHARDSON,
Assistant Attorney General,
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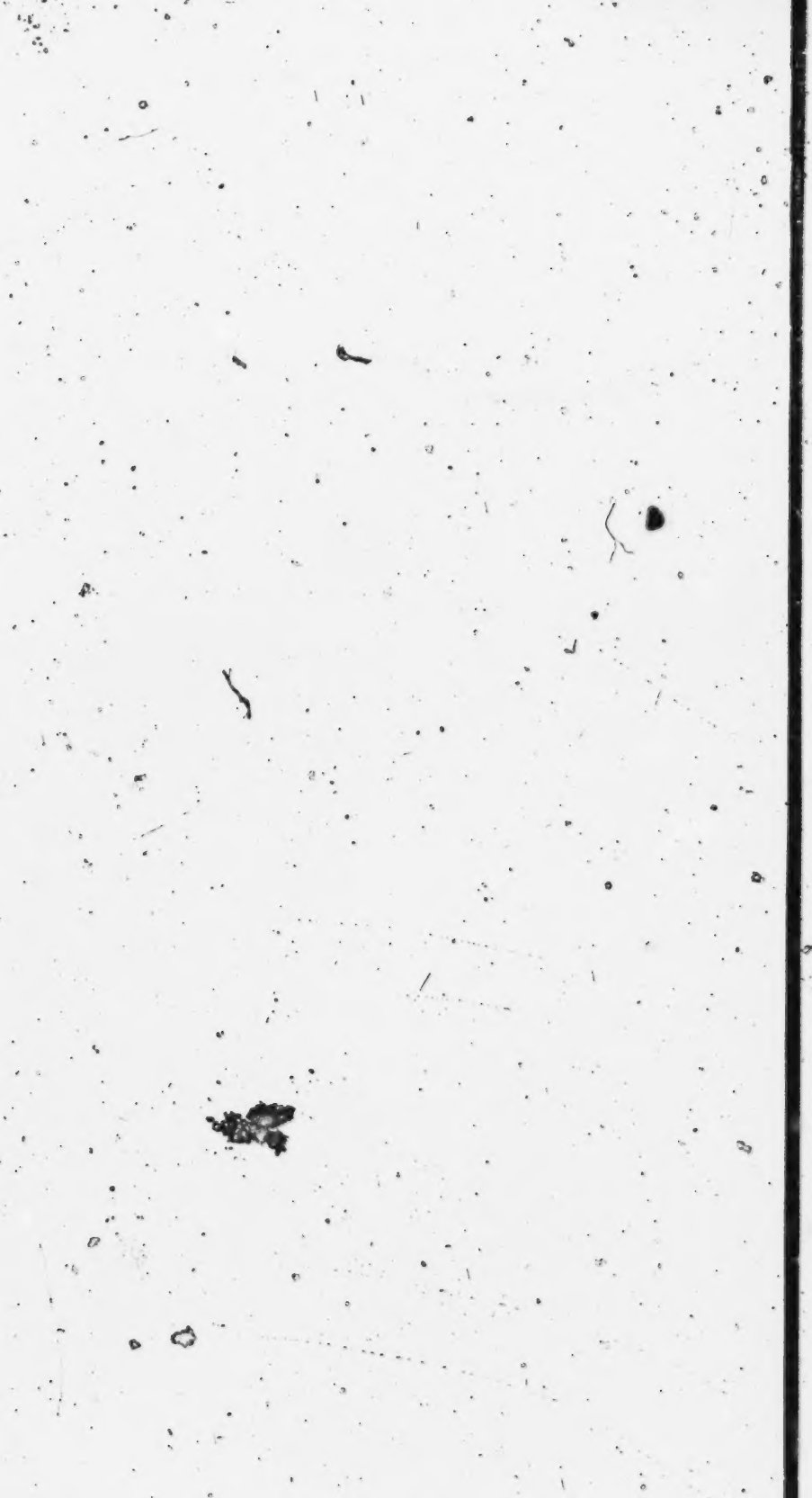
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 703

ERWIN MANGET ENZOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 251-256; Pet. App. 12-17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1958 (R. 257; Pet. App. 11). A petition for rehearing was denied on January 14, 1959 (R. 258-263). The petition for a writ of certiorari was filed on February 12, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's co-conspirator was sufficiently identified as a party to a monitored conversation regarding a planned narcotics sale to render the conversation admissible in evidence.

2. Whether the Court of Appeals could remand the case to the district court for entry of a proper mandatory sentence of at least five years' imprisonment, in lieu of the invalid four-year sentence imposed by the district court.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * * *

26 U.S.C. (Supp. V) 4705(a), 68A Stat. 551, provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. (Supp. V) 7237, 70 Stat. 568, provides:

* * * * * *

(b) Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) * * * shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. * * *

• • • • •

(d) Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section * * * the imposition or execution of sentence shall not be suspended, probation shall not be granted, * * *.

STATEMENT

Petitioner and Albert A. Tucker were charged in count 1 of an indictment in the United States District Court for the Northern District of Georgia (R. 1-4) with a conspiracy to sell unlawfully narcotic drugs not in pursuance of a written order in violation of 26 U.S.C. 4705(a) (*supra*, p. 2). Counts 2 and 3 charged petitioner and Tucker with the unlawful sales of narcotics as substantive violations of 26 U.S.C. 4705(a) and 26 U.S.C. 4704(a) (R. 4-5). Tucker entered a plea of guilty and received a sentence for four years' imprisonment which he was serving at the time of the trial (R. 21-22). Petitioner was found guilty on the conspiracy charge alone, and was sentenced to four years' imprisonment (R. 241-243). On appeal, the Court of Appeals found that there was no error in the trial, but remanded the case to the district court for the entry of a mandatory minimum prison term of at least five years under 26 U.S.C. 7237(b) (*supra*, pp. 2-3), in lieu of the four-year term which the district court had erroneously imposed under the general conspiracy

statute, 18 U.S.C. 371 (*supra*, p. 2), mentioned in the indictment (Pet. App. 11, 14-17).

Pertinent evidence adduced at the trial may be summarized as follows:

In January 1957, in Atlanta, Georgia, petitioner asked Tucker whether he could dispose of some narcotics. Pursuant to this request Tucker contacted a drug addict named Carroll, and offered to sell him narcotics (R. 12, 13, 44). Carroll reported this to federal narcotics agents and worked as an undercover agent for them in the transactions which ensued (R. 45, 46, 47, 48).

On March 20, 1957, the date of a number of the overt acts alleged in the conspiracy count and the date of the two substantive counts (R. 2, 3, 4), Tucker, as the go-between for petitioner, negotiated with Carroll for a narcotics sale. Tucker telephoned petitioner, who, in his station wagon, delivered the narcotics to Tucker. Carroll paid Tucker with $275 in government funds which the agents had given to Carroll for the purchase (R. 13-17, 44-46). Petitioner gave Tucker $20 and drove away with the remaining $255 (R. 16-17). This sale occurred under the surveillance of two federal narcotics agents and an Atlanta detective (R. 57-65, 104-109, 123-126). At that time no arrest was made, Carroll being engaged in other undercover investigations not yet completed (R. 98, 99).

On April 11 and 12, 1957, Carroll and Tucker had further discussions about another narcotics sale for $500 (R. 17, 18, 20, 65, 69-71, 126-128). Tucker also met with, and talked to, petitioner several times about the intended sale. Petitioner gave Tucker a list of narcotics (U. S. Ex. 1) which petitioner described as "what he had left" (R. 17-21). No sale was made at this time.

however, since Tucker became so intoxicated that he was arrested for drunkenness (R. 20, 47).

The following colloquy occurred during the direct examination of agent Barber in regard to the April 11, 1957, conversation between Carroll and Tucker (R. 65-66):

Q. Now; did you make any further investigation?

A. Yes, sir; on the night of April 11, I observed Agent Thomas place a Schmidt device on special employee Avery Carroll and observed Avery Carroll to enter 313 Washington Street.

Q. What is that Schmidt device?

A. It's a pocket transmitter, it is a miniature radio transmitter.

Q. All right.

A. And we—I had previously determined that Albert Tucker was living at 313 Washington Street, and over the Schmidt device I heard Avery Carroll go up and talk to a person that he identified as Tucker.

Mr. Asinof: We object to that.

The Court: I sustain it. * * *

* * * * *

Q. Did you make any other observations after that time, Mr. Barber?

The Court: So you won't misunderstand; I don't sustain any objection to what he heard over the Schmidt device, I sustain the objection to what Carroll said or who he said he was talking to over the device, any identification that he might have made.

Q. What did you—what else happened on that night at the time you heard anything on the—did you have a receiver for the—

A. Yes, sir; we were parked on Washington Street—

Q. —Schmidt device?

A. —just across the street from 313 Washington Street, and I could hear over the Schmidt device, a person said his connection still had some tincture of opium—

Mr. Gower: We object unless it was Albert Tucker and he can identify him as Albert Tucker.

The Court: Well, Albert Tucker has testified and Carroll has testified in the case, and I am going to admit it. Go ahead.

A. Person said that his connection had some tincture of opium, some demerol, some codeine tablets—

After defense objections as to lack of a proper foundation for testimony as to what was heard over the radio transmitter, the witness stated that the transmitter had previously been tested for accuracy and that he could recognize Carroll's voice coming in over it (R. 66-69). Over defense objection as to lack of identification of the person talking to Carroll, the agent was permitted to testify that "This other person on the Schmidt device said that he could not contact his connection that night, but he could the following morning, and that he could call Avery Carroll about noon" (R. 69-70).

During the April 11 conversation, Carroll was out of sight of the agents when he entered the building at 313 Washington Street (R. 126), but on April 12 the agents

saw Carroll with Tucker when they monitored his conversation on the Schmidt device (R. 70, 71, 127, 128). Tucker, Carroll, and the agents testified regarding these conversations (R. 17, 47, 66, 69-70, 126-128). On redirect examination, Carroll testified that, while he was wearing the Schmidt device, the only persons with whom he had conversations concerning narcotics were Tucker and the narcotics agents (R. 101, 102).

Defense counsel stipulated that the list of narcotics drugs (U. S. Ex. 1) was in the petitioner's handwriting, and that the drugs obtained by Carroll in the sale on March 20, 1957, were drugs which were included in the relevant narcotics statutes (R. 135, 125-126). The list and the narcotics were received in evidence without objection (R. 136, 137).

Petitioner testified on his own behalf that he had never had any dealings in narcotics (R. 156). He admitted writing the list of narcotics (U. S. Ex. 1), but explained that he had done so at Tucker's request only to humor Tucker as an intoxicated person. Petitioner stated that, after he had finished writing the list, Tucker suggested that he could buy these drugs with a proposed loan from petitioner and sell them at a profit in which petitioner would share. Petitioner testified that he refused to participate in such a venture (R. 155-156, 175-176).

ARGUMENT

1. There is no merit to petitioner's contention that agent Barber's testimony as to the April 11, 1957, conversation which he heard over the Schmidt device between Carroll and another person, supposed to be Tucker (see the Statement, *supra*, pp. 5-6), was inadmissible hearsay, since Tucker had not been sufficiently

identified as the other party to the conversation (Pet. 6-7). Petitioner concedes, as he must, that if Tucker was the other party to the conversation, then the conversation was admissible since Tucker was charged as a co-conspirator (Pet. 6). See *Delaney* v. *United States*, 263 U. S. 586, 590.

The argument denying sufficient identification of Tucker overlooks the fact that on April 11 Carroll was seen by the agents to enter 313 Washington Street, the known address of Tucker, shortly before the conversations were recorded (R. 65, 126). Then on April 12, when further conversations occurred regarding the same planned narcotics sale which eventually did not take place, agent Thomas, while listening in on the Schmidt device, saw Carroll and Tucker while they were conversing (R. 127, 128). Moreover, after the question of Tucker's identity was raised, Carroll testified on redirect examination that, while he was wearing the Schmidt device, the only persons with whom he had conversations concerning narcotics were Tucker and the narcotics agents (R. 101, 102). This testimony eliminated the unknown drunken person to whom Carroll said he had spoken, as the possible participant in the challenged conversation with Carroll, since the discussion was definitely about narcotics. And even though Carroll did not specifically name the "narcotics agents" to whom he had spoken while wearing the Schmidt device, it is clear that he was referring only to agents Barber and Thomas. Other parts of the record show that it was with these agents that Carroll dealt in arranging the narcotics sales involved (R. 57, 65, 67-70, 123-128). The result is that Tucker was satisfactorily identified as the other person to the conversation with Carroll on April 11, 1957. Cf. *On Lee* v. *United*

States, 343 U. S. 747; *United States* v. *Bucur*, 194 F. 2d 297, 303-304 (C.A. 7)

The challenged conversation on April 11, moreover, was not significant in the light of all the evidence, including the conversation on April 12. Petitioner was not mentioned by name as the source of the narcotics, but merely referred to as the "connection". The crucial and important evidence was the testimony of Tucker disclosing that the "connection" he referred to was in fact the petitioner.

2. There is no substance in petitioner's complaint that the Court of Appeals improperly ordered a remand for the district court to enter an appropriate sentence of at least five years' imprisonment, since the original four-year sentence was invalid (Pet. 7-9).

Even though the indictment mentions the general conspiracy statute, 18 U.S.C. 371 (*supra*, p. 2), under which the trial court erroneously imposed the original four-year sentence, it is clear that the conspiracy actually charged was one to commit a violation of 26 U.S.C. 4705(a) (*supra*, p. 2), which carries with it a minimum mandatory penalty for five years' imprisonment under 26 U.S.C. 7237(b) (*supra*, pp. 2-3) (R. 1, 3-4). It is the indictment itself, and not the statute cited, which determines the offense charged. *Williams* v. *United States*, 168 U. S. 382, 389; *United States* v. *Hutcheson*, 312 U. S. 219, 229. Between the two statutes punishing conspiracy, the specific statute takes precedence over the general statute. *Masi* v. *United States*, 223 F. 2d 132, 133 (C.A. 5), certiorari denied, 350 U. S. 919; *United States* v. *McKnight*, 253 F. 2d 817, 820 (C.A. 2); and see *Kepner* v. *United States*, 195 U. S. 100, 125; *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.

Since the sentence imposed was invalid as less than the statutory minimum, the Court of Appeals, upon suggestion by the government, had power to remand the case to the district court for a proper sentence. This procedure will not violate the double jeopardy clause of the Fifth Amendment. *Bozza* v. *United States*, 330 U. S. 160; *Hayes* v. *United States*, 249 F. 2d 516 (C.A. D.C.), certiorari denied, 356 U. S. 914; *Barrow* v. *United States*, 295 Fed. 949 (C.A. D.C.); Rule 35, F. R. Crim. P.[1] The Court of Appeals was merely ordering the district court to set aside a sentence which it had no authority to impose in the first place. When the district court corrects the sentence it will impose "a valid punishment for an offense instead of an invalid punishments for that offense." *Bozza* v. *United States, supra*, at 167.

There will be no illegal increase of petitioner's sentence, since the original sentence was void *ab initio*.[2] The decision below is not at variance with *Ex parte Lange*, 18 Wall. 163, 174-176, where part of the original sentence for both imprisonment and a fine was valid and the prisoner fulfilled a valid sentence by payment of the fine, so that further punishment was held violative of the double jeopardy clause. A valid sentence may not be increased, but an invalid sentence may be corrected.

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[1] Rule 35 provides: "The court may correct an illegal sentence at any time. * * *"

[2] Petitioner has not begun to serve any part of the original four-year sentence. The Court of Appeals' mandate was stayed pending this Court's ruling on the petition for a writ of certiorari (R. 265).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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